BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAWN SMITH	)	
Claimant	)	
	)	
VS.	)	Docket No. 234,336
	)	
	)	
RUBBERMAID SPECIALTY PRODUCTS	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the December 24, 2002, Award of Administrative Law Judge Jon L. Frobish. The Board heard oral argument on May 16, 2003. Stacy Parkinson was appointed as Board member pro tem for the purpose of determining this matter.

APPEARANCES

Randy Stalcup of Wichita, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties stipulated that claimant met with personal injury to her lower back arising out of and in the course of her employment on February 16, 1997. The parties disputed the nature and extent of her disability as a result of her work-related injury. The Administrative Law Judge (ALJ) determined claimant had suffered a 37 percent work disability based upon a 36.5 percent wage loss and a 37.5 percent task loss.

The respondent requested review of the nature and extent of claimant's disability. Respondent argues claimant's award should be limited to her functional impairment rating

because had she applied for re-employment after she received permanent restrictions the respondent would have hired her at a comparable wage. In the alternative, respondent argues that in the determination of claimant's wage loss, the imputed wage should include the value of fringe benefits or the imputed wage should be compared to claimant's base wage without fringe benefits. Lastly, respondent argues the most persuasive task loss opinion was Dr. Stein's opinion utilizing Karen Terrill's task list.

The claimant argues that she made a good faith effort to find employment until the birth of her child. After that the claimant argues the imputed wage should have been $7 an hour instead of the ALJ's determination she was capable of making $8 an hour. Claimant requests the ALJ's Award be affirmed in all other respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant injured her low back when a machine she was operating malfunctioned. Claimant was provided treatment and eventually was taken off work. At one point she attempted to return to work but after a couple of days she was told the respondent could not accommodate her temporary restrictions. Claimant was then off work for an extended period while she continued to receive medical treatment.

Claimant was terminated by respondent in March 1998. The termination was the result of respondent's restrictive duty policy. Janice Marr, respondent's safety and workers compensation manager, described the policy:

> Q. Can you describe for the Court -- I know it is a document, but I don't have a copy with me. So just if you would, describe to the Court the basics of that restrictive-duty policy.
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> A. Restrictive-duty policy came about so that we would be able to work with associates both from a workers' comp standpoint and from a personal medical standpoint that they could continue to work with restrictions for up to a period of time. We have a limit of 12 weeks and we review that. At the end of 12 weeks, if there's an end in sight or improvement, we can extend it out for one time up to another 12 weeks, which would be a total of 24 weeks that a person can be on restrictions. At any time during that time frame if a person brings us permanent restrictions, then it is our responsibility to do what we call a walk-around. And we ask that associate be able to perform at least 50 percent of the essential functions of the jobs out there so that it doesn't cause undue hardship on other associates that we rotate every hour to different positions for ergonomic reasons. But if at any

> time the person or the individual doesn't bring us restrictions before the 24-week -- permanent restrictions before the 24-week time frame is up, then we do take the person off of work on sick leave and they can remain on sick leave up to one year. At the end of one year then their employment with Rubbermaid would be terminated.[1]

But Ms. Marr further testified that if an employee receives permanent restrictions after they have been terminated then they do not receive a walk-around.

After claimant was terminated she looked for work at Wal-Mart and Dillons stores and looked for work through the Job Service Center as well as in the newspaper. In August 1998 claimant began work at Kirby de Wit selling vacuum cleaners on commission. She made a couple of hundred dollars a week but quit that job in December 1998.

Claimant then took a job with U.S.D. 475 district as a lunch aide in January 1999. She worked about an hour a day, five days a week and made $7 per hour. Claimant also began subbing as a para-educator at U.S.D. 460. In March 1999, that became a full-time position working about 30 hours a week making $4.95 per hour. That job ended June 1999, but claimant was offered the position the following school year. But claimant had a son born three months premature in August 1999 and she could not return to work.

Claimant has an associate of arts degree in criminal justice and is a certified nurse assistant and certified medication aide. Claimant does not argue that she made a good faith effort to find work after her work ended in June 1999. After that time she had another pregnancy and limited her work, if any, to part-time employment. She has occasionally worked and was employed at Pizza Hut working 20 hours a week for $7 an hour in April 2002.

Claimant was examined by Dr. Bernard T. Poole on two occasions. At the first visit the doctor performed a physical examination and ordered an MRI. At the second examination on March 2, 1998, Dr. Poole again examined claimant and reviewed the MRI results. The doctor opined claimant had a small central herniation of a degenerated L5-S1 disk with mild instability. The doctor imposed restrictions of: (1) lifting from the floor to the waist 20 pounds occasionally, 10 pounds frequently and 4 pounds constantly; (2) lifting from the floor to 67 inches is 20 pounds occasionally, 10 pounds frequently and 4 pounds constantly; (3) carrying 25 pounds occasionally, 13 pounds frequently and 5 pounds constantly; (4) pushing 13 pounds occasionally, 7 pounds frequently and 3 pounds constantly; and, (5) pulling 15 pounds occasionally, 8 pounds frequently and 4 pounds constantly.

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[1] Marr Depo. at 11-12.

Respondent's attorney referred claimant to Dr. Paul S. Stein on October 17, 2001, for examination. Dr. Stein's diagnosis was degenerative disk change and lumbar strain superimposed on a degenerative disk. The doctor imposed restrictions of lifting up to 35 pounds occasionally and 15 pounds more often. He recommended claimant avoid repetitive bending and twisting of the lower back. He did not impose any specific restrictions on sitting, standing or walking. Regarding the bending restriction, Dr. Stein said it applied to bending from 50 percent to the floor. Dr. Stein rated claimant 5 percent to the body as a whole, based on the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Karen Terrill, respondent's vocational expert, reviewed a job analysis that had been completed by Steve Benjamin of Corvel Corporation. The job analysis covered a production worker/team member for respondent. The analysis covered the blow molder position, 48-quart cell and number 23 blow molder. Ms. Terrill noted the essential functions of a production worker included assembling parts, packaging parts, blows foam in processing parts, inspects parts and sweeping as part of cleanup. The analysis done by Mr. Benjamin resulted in a total of 94 separate tasks to perform the three jobs that were analyzed. Claimant objected to Ms. Terrill's testimony, because there was no evidence claimant had performed the jobs that were analyzed. Ms. Terrill additionally noted claimant had the capacity to earn from $7 to $9.

Jerry Hardin, claimant's vocational expert, met with claimant and prepared a list of tasks claimant had performed in each job in the 15 years preceding her work-related injury. Mr. Hardin opined claimant retained the capacity to earn $7 an hour.

Dr. Stein reviewed the task list prepared by Mr. Hardin and concluded claimant could no longer perform 12 of 34 tasks and provided a qualified answer regarding an additional two tasks. Dr. Stein also reviewed the task analysis prepared by Mr. Benjamin and concluded claimant had lost the ability to perform 6 of 94 tasks.

Nature and Extent of Disability

It is undisputed that as a result of her work-related accident on February 16, 1997, claimant has a 5 percent permanent partial functional impairment to the whole body. The dispute is whether claimant is limited to her functional impairment or whether she is entitled to a work disability.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

Respondent argues that if claimant had re-applied for a job when she received her permanent restrictions that she would have been hired at a comparable wage. Respondent notes claimant made no effort to reapply for her job with respondent.

The Act neither imposes an affirmative duty upon the employer to offer accommodated work nor does it impose an affirmative duty upon the employee to request accommodated work. Whether claimant requested accommodated work from an employer is just one factor in determining whether the claimant made a good faith attempt to obtain appropriate work.[5]

The evidence establishes that after claimant received permanent restrictions from Dr. Poole in April 1998, she did not reapply for employment with respondent nor did respondent offer claimant accommodated work. Although respondent argues claimant would have been able to return to work for respondent, such argument is based upon restrictions from Dr. Stein which were not provided until October 17, 2001, or over three years after claimant had been terminated. And Ms. Marr testified that if Dr. Poole's restrictions were followed claimant would not be able to return to work for respondent, but that she could have returned to work if Dr. Stein's restrictions were followed. Moreover, despite respondent's argument that claimant would have been hired if she had re-applied for a job, Ms. Marr testified that she did not know if claimant would be hired with her permanent restrictions.[6]

The Board concludes that the evidence does not support respondent's assertions that claimant would have been hired or accommodated if she had re-applied for a job with respondent. And the three year lapse between claimant's termination and respondent obtaining a doctor's opinion establishing restrictions that could be accommodated, without ever extending an offer of re-employment to claimant, simply does not demonstrate good faith on the part of respondent.[7]

But that does not end the inquiry whether claimant made a good faith effort to find appropriate employment. The claimant testified that after her termination she looked for employment but supplied no information regarding the number of prospective employers she contacted during her job search. She did obtain employment selling vacuum cleaners and was paid on a commission basis but she quit that job within a few months. After leaving that job the claimant worked as a volunteer or on a part-time basis for a school district. It was also during this period that claimant gave birth to a child who was three

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[5] *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288 (1999).

[6] Marr Depo. at 24.

[7] *Edwards v. Klein Tools, Inc.*, 25 Kan. App. 2d 879, 974 P.2d 609 (1999).

months premature which prevented her from continuing in a job with the school district. When claimant attempted to return to work she looked for part-time employment and then also had another pregnancy which resulted in the birth of twins.

Considering the whole record, it cannot be said claimant has met her burden of proof to establish that she made a good faith effort to obtain employment after she was terminated from her employment with respondent. Consequently, a post-injury wage must be imputed to claimant based upon the evidence, including the expert testimony regarding claimant's capacity to earn wages. Mr. Hardin, claimant's vocational expert testified claimant had the capacity to earn $7 an hour. Ms. Terrill, respondent's vocational expert, testified claimant had the capacity to earn between $7 and $9 an hour. The ALJ concluded and the Board agrees, claimant has the capacity to earn $8 an hour. This results in a 36.5 percent wage loss for the wage loss component of the work disability formula.

Respondent argues that the imputed wage should include the value of fringe benefits because vocational expert Karen Terrill opined the majority of jobs claimant could obtain would probably have some type of fringe benefits. But Ms. Terrill did not provide a monetary value regarding these expected fringe benefits. Accordingly, respondent did not meet its burden of proof to establish a value to impute.

Turning to the task loss component of the work disability formula, the evidence consists of Dr. Stein's opinions utilizing the task list prepared by Mr. Hardin and the generic task analysis for a production worker prepared by Mr. Benjamin. The ALJ concluded the doctor's opinion based upon the task list prepared by Mr. Hardin was the most persuasive and the Board agrees.

Simply stated the generic analysis prepared by Mr. Benjamin was for three separate jobs a production worker for respondent would perform on December 28, 2001. Ms. Terrill admitted that there had been some restructuring of the lines and the job descriptions had changed over the years. Consequently, it is not clear that claimant performed the same duties when she was working in 1997, that were analyzed by Mr. Benjamin. And it is unclear whether claimant specifically performed any or all of the three jobs analyzed. This analysis does not meet the statutory requirement that task loss must be based upon the jobs performed by the claimant. Accordingly, the Board affirms the ALJ's determination claimant suffered a 37.5 percent task loss based upon Dr. Stein's opinion utilizing the task list prepared by Mr. Hardin.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 24, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy Stalcup, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation